No. 22,248

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,*

v.

HAROLD C. and OLIVE B. ISAAK, *Appellees.*

On Appeal from the Judgment of the United States District Court for the Eastern District of Washington

---

BRIEF FOR THE APPELLANT

MITCHELL ROGOVIN
Assistant Attorney General.

MEYER ROTHWACKS,
HARRY BAUM,
LOUIS M. KAUDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:
SMITHMOORE P. MYERS,
United States Attorney.

LAWTON PRINTING, INC., 2-16-68—50 COPIES

INDEX

CITATIONS

CITATIONS (Continued)

No. 22,248

IN THE

United States
Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,*

v.

HAROLD C. and OLIVE B. ISAAK, *Appellees.*

On Appeal from the Judgment of the United States District Court for the Eastern District of Washington

---

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the court below is reported at 267 F. Supp. 595.

JURISDICTION

This appeal involves federal income taxes for 1957. On July 7, 1963, taxpayers paid a deficiency in their taxes for 1957 of $5,796.51 (R. 2, 38.) A timely claim for refund was thereafter filed which was rejected on

June 23, 1964. (R. 2, 4.) Within the time provided in Section 6532 of the Internal Revenue Code of 1954, on March 21, 1966, taxpayers brought this timely action in the District Court for recovery of the taxes paid. (R. 1-3.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346(a). The judgment of the District Court in favor of the taxpayers was entered on June 5, 1967. (R. 41.) Within sixty days thereafter, on August 1, 1967, the United States filed a notice of appeal. (R. 42.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Did the District Court err in holding that a farmer-taxpayer who has elected under Section 77 of the Internal Revenue Code of 1954 to include in income amounts received as loans from the Commodity Credit Corporation may nonetheless exclude from income so much of the amounts as the taxpayer repays before the end of the taxable year in redemption of his crops held as collateral for such loans?

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in Appendix A, *infra*.

STATEMENT

The facts as stipulated and found by the District Court are as follows:

Taxpayers are husband and wife who own a wheat

farm of approximately 3,000 acres in Grant County, Washington. (R. 37.) They report their income on a calendar year basis and maintain their books on a cash basis. (R. 26, 38.)

From time to time prior to the taxable year 1957, taxpayers borrowed money from the Commodity Credit Corporation, an agency of the United States Department of Agriculture, using their wheat crops as collateral. (R. 38.) Prior to 1957, taxpayers elected, pursuant to Section 77 of the Internal Revenue Code of 1954, to treat Commodity Credit loans as income on their tax returns, and that election was in effect for 1957. (R. 38-39.) During 1957 taxpayers received loans from the Commodity Credit Corporation in the total amount of $35,884.21. (R. 39.) On August 6, 1957, they borrowed the sum of $25,341.86 from the Commodity Credit Corporation and pledged, as collateral, wheat stored at a grain company in Hartline, Washington. (R. 32, 39.) On August 14, 1957, they borrowed the sum of $2,479.33 from the Commodity Credit Corporation and pledged as collateral wheat stored at a grain company in Coulee City, Washington. (R. 26, 33.) These loans were repaid by the taxpayers on December 5, 1957 and November 15, 1957, respectively, at which times the pledged crops were redeemed. (R. 26, 39.) Thereafter, and within the taxable year 1957, taxpayers sold a portion of the redeemed crops for $12,000. (R. 27, 39.)

Taxpayers reported as income on their joint 1957

tax return Commodity Credit loans in the amount of $7,749.10. They also reported as income the $12,000 received from the sale in 1957 of a portion of the redeemed wheat. (R. 39.) They also deducted all costs and expenses incidental to growing, harvesting and handling the wheat pledged as security to the Commodity Credit Corporation (R. 40) and the interest paid on the loans (R. 28). The wheat that was redeemed and not sold in 1957 was sold in 1958 and the amounts received were reported as income by the taxpayers in their 1958 return. (R. 40.)

The Commissioner in determining a deficiency for 1957 increased taxpayers' taxable income in the amount of $16,135.11, representing the unreported portion of the redeemed Commodity Credit loans. (R. 39.) The adjustment was computed as follows (R. 27, 40):

Commodity Credit loans received in 1957	$35,884.21
Commodity Credit loans reported in 1957	7,749.10
Unreported Income	$28,135.11
Less Redeemed Wheat Sales Reported	12,000.00
Adjustment to Income	$16,135.11

Taxpayers paid the deficiency and, following disallowance of their subsequent claim for refund, brought this action. (R. 25-26, 38.) The case was submitted for decision on an agreed statement of facts and judgment

ceived rather than waiting until the loan expires or the pledged commodity is redeemed and resold in a later year. The single issue in this case is whether an electing taxpayer who has received such loans may exclude them from income when, later in the same tax year, he chooses to repay the loan and redeem the crops pledged as collateral. The Government's position is that for an electing taxpayer a Commodity Credit loan must be treated as if it were a sale of the pledged crop upon execution of the loan, and that subsequent redemption of the crop cannot change the tax effect of the original transaction. The statute and its legislative history clearly intend that the sale analogy apply to farmers who make the permitted election, and to permit an electing taxpayer to alter the tax consequences of the original transaction by choosing later in the year to redeem his crops would distort the purpose of the statute and give the taxpayer an opportunity to manipulate income for reasons unrelated to the statute's remedial objective.

The present taxpayers had made their election to include Commodity Credit loans in income when received prior to 1957, and that election was in effect in 1957. At harvest time in the summer of 1957 taxpayers procured Commodity Credit loans for which they pledged portions of their wheat crop. After harvest, but before the end of the tax year, taxpayers chose to redeem some of the wheat posted as collateral for the loans. (R. 26.) Some of the redeemed wheat was sold in the

tax year and the rest in the next year (R. 27) and, although the record does not provide any insight into taxpayer's motives, it may be presumed that it was to their advantage to sell the wheat themselves at a price higher than the amount of the loan or to include at least a portion of the proceeds for their wheat in their income for the following year. Neither of these motivations suffice to permit a taxpayer to revoke a completed income transaction and avoid the tax effect of the prior election and receipt of income, and there is no reason grounded in the language or policy of Section 77 to permit the present taxpayers that freedom of action.

Section 77(a) provides that "Amounts received as loans from the Commodity Credit Corporation shall, at the election of the taxpayer, be considered as income and shall be included in gross income for the taxable year in which received." Section 77(b) provides that the election allowed by Section 77(a) "shall be adhered to with respect to all subsequent taxable years unless with the approval of the Secretary or his delegate a change to a different method is authorized." Thus the language of the statute specifies that it is the receipt of the proceeds of the loan that is the taxable event, and also that a taxpayer should enjoy no freedom to switch back and forth from reporting or not reporting loan amounts as he chooses without the approval of the Commissioner.

ceived rather than waiting until the loan expires or the pledged commodity is redeemed and resold in a later year. The single issue in this case is whether an electing taxpayer who has received such loans may exclude them from income when, later in the same tax year, he chooses to repay the loan and redeem the crops pledged as collateral. The Government's position is that for an electing taxpayer a Commodity Credit loan must be treated as if it were a sale of the pledged crop upon execution of the loan, and that subsequent redemption of the crop cannot change the tax effect of the original transaction. The statute and its legislative history clearly intend that the sale analogy apply to farmers who make the permitted election, and to permit an electing taxpayer to alter the tax consequences of the original transaction by choosing later in the year to redeem his crops would distort the purpose of the statute and give the taxpayer an opportunity to manipulate income for reasons unrelated to the statute's remedial objective.

The present taxpayers had made their election to include Commodity Credit loans in income when received prior to 1957, and that election was in effect in 1957. At harvest time in the summer of 1957 taxpayers procured Commodity Credit loans for which they pledged portions of their wheat crop. After harvest, but before the end of the tax year, taxpayers chose to redeem some of the wheat posted as collateral for the loans. (R. 26.) Some of the redeemed wheat was sold in the

tax year and the rest in the next year (R. 27) and, although the record does not provide any insight into taxpayer's motives, it may be presumed that it was to their advantage to sell the wheat themselves at a price higher than the amount of the loan or to include at least a portion of the proceeds for their wheat in their income for the following year. Neither of these motivations suffice to permit a taxpayer to revoke a completed income transaction and avoid the tax effect of the prior election and receipt of income, and there is no reason grounded in the language or policy of Section 77 to permit the present taxpayers that freedom of action.

Section 77(a) provides that "Amounts received as loans from the Commodity Credit Corporation shall, at the election of the taxpayer, be considered as income and shall be included in gross income for the taxable year in which received." Section 77(b) provides that the election allowed by Section 77(a) "shall be adhered to with respect to all subsequent taxable years unless with the approval of the Secretary or his delegate a change to a different method is authorized." Thus the language of the statute specifies that it is the receipt of the proceeds of the loan that is the taxable event, and also that a taxpayer should enjoy no freedom to switch back and forth from reporting or not reporting loan amounts as he chooses without the approval of the Commissioner.

The Commissioner treats a Commodity Credit loan transaction for income tax purposes as if it were a sale of the collateral upon execution of the loan and a repurchase of the collateral upon redemption. That analogy and the resulting tax treatment draw explicit support from the legislative history of Section 77 and from the inclusion in the basis provisions of the Code of a rule prescribing the electing farmer's basis in redeemed Commodity Credit loans. Section 1016(a)(8), Internal Revenue Code of 1954 (Appendix A, *infra.*) The purpose of these provisions was explained by the Senate Finance Committee in its report (S. Rep. No. 648, 76th Cong., 1st Sess., p. 8 (1939-2 Cum. Bull. 524, 529)), which accompanied the Revenue Act of 1939, c. 247, 53 Stat. 862, Section 223(a) of which added Sections 123 and 113(b)(1)(G) (the predecessors of 1954 Code Sections 77 and 1016(a)(8)) to the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Secs. 113, 123), as follows:

> The attention of your committee has been drawn to the fact that loans by the Commodity Credit Corporation to producers of agricultural commodities, on the security of such commodities, though in form loans, should be treated for income-tax purposes as though such commodities had been sold in the year of the loan for the amount of the loan. Nevertheless, existing law requires them to be treated as loans, with the result that when the pledged commodities are eventually sold taxpayers are required to take up a large amount of income and, in addition, will not longer have available to them their deductions on account of production

> expenses. In order to avoid this harsh result, section 223 of the bill adds a new section 49 to the Internal Revenue Code, giving taxpayers an election to treat such loans as income. An election once so made is binding as to all future years unless the Commissioner's approval is obtained to a change of method. Section 223 also adds a new section 113(b)1(G), providing for proper adjustments of basis in the event it ever becomes material to compute gain or loss upon a subsequent sale or other disposition of such commodities.

The sale analogy and the prohibition against changing one's mind after a transaction has been completed were spelled out even more clearly in the House debate on the Senate amendment which added Section 223(a) to the Revenue Act of 1939. Representative Cooper, spokesman in behalf of the amendment, explained (84 Cong. Record Part 7, p. 7804 (1939)):[9]

> Mr. Cooper. * * *
>
> * * *
>
> The next amendment appearing at the bottom of page 44 has to do with commodity-credit loans. It provides in simple terms that where a farmer places his products, cotton or whatever the product may be, in what is commonly termed the Government loan, he receives a loan on that product. This provides that so far as the question of taxes is concerned the transaction may be treated the same

---

[9]The full text of the House discussion of Section 223(a) of the Senate-passed bill is set forth in Appendix B, *infra*.

as the sale of that product so far as the amount of money he receives is concerned. The point, of course, is that a farmer might get a loan this year and his product continue in the Commodity Credit Corporation. Next year he might get a loan and so on. The result might be that, considered as a loan, the income would all come at one time, so far as the tax is concerned, and he might be required to pay a tax on the whole amount whereas he had been receiving these loans all along. The effect of this amendment is simply to treat these loans to the farmer so far as internal [sic] taxes are concerned the same as if it had been a sale.

* * *

Mr. August H. Andresen. In the case of corn, where a loan of 57 cents per bushel is made on the corn, and we will assume the market price is 40 cents, is it optional with the farmer to treat that loan either as a sale or as a loan?

Mr. Cooper. That is right.

Mr. August H. Andresen. It is optional with him?

Mr. Cooper. It is optional with the farmer, so far as the income tax is concerned, whether he wants to treat it as a loan or sale.

Mr. August H. Andresen. Assuming that he does treat it as a sale, but decides after he has made his return that he wants to treat it as a loan, and he loses 10 cents a bushel on the corn.

Mr. Cooper. He cannot do that. If he wants to exercise his own option and treat it as a sale and pay his income tax on the sale, then he cannot come

> back later and say, "I want to change it now and treat that as a loan and not as a sale." He has to do one or the other.

In further explaining the effect of a farmer's election to treat Commodity Credit loans as sales, Representative Cooper stated in response to a question that, although the bill permits a change of election upon the Commissioner's approval (see Section 77(b), Internal Revenue Code of 1954), "there is no permit to change with respect to the years in which the taxpayer has already elected to treat such loans as sales" and that "You cannot get a permit to change after you once exercise your option and elect." (84 Cong. Record, Part 7, p. 7804 (1939)). Consistent with this expression, the Regulation under Section 77 requires that an application for permission to make a change in the method of accounting in a year subsequent to the year in which the loans are first reported as sales must be filed within 90 days after the beginning of the taxable year. Treasury Regulations on Income Tax (1954 Code), Section 1.77-1 (Appendix A, *infra.*) Thus, without a formal application for permission to make the change, the farmer is presumed to have chosen to remain on the sales method of reporting the loans and that method must apply to all loans as they are received in the taxable year.

The basis provision, Section 1016(a)(8), Internal Revenue Code of 1954, establishes that Congress anticipated continued dealing between an electing farmer

and the Commodity Credit Corporation with respect to particular loans after they were first negotiated and provided for adjustments to basis to carry through the sale-repurchase analogy. Section 1016(a)(8) provides that basis adjustments shall be made "in the case of property pledged to the Commodity Credit Corporation, to the extent of the amount received as a loan from the Commodity Credit Corporation and treated by the taxpayer as income for the year in which received pursuant to section 77 * * *." Regulations Section 1.1016-5(e) (1954 Code) (Appendix A, *infra*) provides that "the basis of such property shall be increased by the amount received as a loan from such corporation and treated by the taxpayer as income for the year in which received under Section 77, * * *." The basis provisions of the Internal Revenue Code generally relate to "the sale or other disposition of property" (Section 1001(a), Internal Revenue Code of 1954) and their invocation necessarily implies a sale or exchange of property. The reference in the Senate report on the Commodity Credit loan provisions to "proper adjustments of basis in the event it ever becomes material to compute gain or loss upon a subsequent sale or other disposition of such commodities" (S. Rep. No. 648, supra, p. 8 (1939-2 Cum. Bull. 524, 529) demonstrates that the sale analogy was intended to continue throughout the transaction. A pertinent "subsequent sale or other disposition of such commodities" can only occur if the taxpayer redeems the pledged crop.

Under the Commodity Credit statutory provisions, if there is no redemption by the time the loan expires the transaction is at an end and the Government may dispose of the crop as it pleases, but without recourse to the borrower for any resulting deficiency. 7 U.S.C., Section 1425 (1964); *Autrey* v. *Commodity Credit Corp.,* 143 F. Supp. 550 (Ark., 1956).[9] It is therefore clear that an electing taxpayer has no occasion to recompute his basis in the crop unless he redeems it, and Congress has prescribed what that basis is upon redemption by treating the transaction as a sale and subsequent repurchase.

The taxpayers apparently do not contest the sale-repurchase analogy as it applies to loans redeemed after the taxable year in which they were made. However, there is no reason to consider a redemption within the taxable year of the loan as a different kind of transaction than a redemption in another taxable year. As a practical matter the transactions are the same except for the date on which they occur. There is no theory

---

[9]Under the commodity credit program the farmer has the option of either repaying the loan by the maturity date and redeeming the pledged crop, or allowing the Commodity Credit Corporation to foreclose and sell it. In the event of foreclosure the farmer-borrower is not personally liable for any deficiency. Therefore no loss is deductible on account of a deficiency, and any excess received is includible in income in the year of receipt. See Regulations §1.77-2.

of taxation which supports a retroactive exclusion from income of items already received based upon events which occur later in the taxable year but which would not support retroactive exclusion if the same later event occurred in a different taxable year. That is, if redemption on January 1 of the taxable year following the year of the loan does not warrant exclusion of the amount from income on the date received, redemption on December 31 of the taxable year of the loan cannot, for any logical or policy reason, justify retroactive exclusion. In short, once the taxpayer elects under Section 77 to treat commodity credit loans as sales income, the election is binding unless and until permission to change such method of accounting is obtained from the Commissioner.

The opinion of the court below (R. 34-36) offers no independent analysis of the legal issue presented here; instead, the opinion briefly quotes from and summarily follows the holding of the Fifth Circuit in *Thompson* v. *Commissioner,* 322 F. 2d 122 (1963), a case which raised the very issue presented here. In *Thompson,* a majority of the court (Chief Judge Lumbard, sitting by designation, dissenting) concluded that an electing farmer would be deprived of his "free ride of the market" (*Id.,* p. 130) if the Commissioner's rule applied, and that the rule poses questions which the Court felt itself unprepared to answer regarding the "yet unexplored right to treat the second transaction not specified in Section 77—the redemption of the loan—as

a sale giving rise to a cost basis." (*Id.,* p. 131). In his dissent, Chief Judge Lumbard observed that once "the taxpayer made his election under § 77 to treat the loans as income at the time of receiving the proceeds of the loans there is no reason why he should not abide the consequences of that decision," that "there is no reason why the courts should relieve him of the consequences [of his election] for one year when it appears to him that it would be more advantageous not to treat the loans as income", and that "It is just as if a taxpayer sells his property, then buys it back and sells it again." *Id.,* p. 132.

The majority views in *Thompson* are vulnerable on two counts: first, the Government's position has no effect whatever on the policy behind the Commodity Credit program that farmers should enjoy flexibility in taking advantage of a fluctuating market, and second, the court made no reference to the explicit basis provision applicable to Commodity Credit loans (Section 1016(a)(8), Internal Revenue Code of 1954) and thus erroneously inferred that Congress had not considered or settled the taxpayer's right to assert a cost basis in redeemed crops. With respect to the farmer's market flexibility, the right to redeem pledged crops exists through to the maturity date of the loan irrespective of the farmer's treatment of the loan amounts for income tax purposes. Commodity Credit loans are made at a rate established at the beginning of the crop year, based upon the rates of the nearest Exchange. That rate

is not reduced during the crop year. At the time of the announcement of the support rate, the maturity date of loans is also announced, a date that always extends into the next calendar year. Not only may the farmer redeem the loan, but at any time prior to one month before the maturity date he may return any part of the redeemed loan in order to obtain another loan at the established rate. (R. 29.) Because these transactions may occur in taxable years after the year of the loan, their subsequent tax treatment must reflect the fact that the original amount of the loan was already reported as income. Thus upon redemption the farmer simply assumes a basis in the redeemed crop equal to the cost of the redemption, i.e. the amount of the loan previously reported as the "sale" price. His right to redeem, repledge, redeem, etc., depending on the market advantage to him in doing so, is unaffected by his inclusion of the original amount in income. If he sells the crop either in the taxable year of the loan or thereafter for an amount greater than his basis, that increment is additional income to him as of the date of sale. Likewise, if he sells at less than his basis, he realizes a reportable loss. In its apprehension regarding cost basis the court in *Thompson* failed to perceive that the problem is no different for a taxpayer who redeems after including the loan in income in the previous year than it is for a taxpayer who redeems in the taxable year of the loan. Since Congress did provide a statutory answer to the basis problem, although un-

acknowledged by the court in *Thompson,* there is no reason for concluding that the basis provision was intended to operate only in the event of redemption in the year following the year of the loan.[3]

The result reached in *Thompson* and followed by the District Court in the present case puts electing taxpayers in the novel position of being able to revoke their election at will (contrary to the express Congressional mandate in Section 77), assess their tax situation as each year comes to a close, and negate transactions which at the time entered into yielded reportable income. If, for example, an electing taxpayer anticipated a poor year compared to the year coming to an end, he could on December 31 redeem a Commodity Credit loan and exclude the amount from income in that year and repledge the crops on January 1 in anticipation of including the amount of the loan in income in the later taxable year. The advantageous apportioning of gross income into various tax years

---

[3] The Government must bear some responsibility for the failure of the court in *Thompson* to refer to Section 1016(a)(8). Although the Government asserted in its brief in *Thompson* that a redeeming farmer assumes a cost basis in the redeemed crop equal to the amount of the redemption, the assertion was not supported by a citation to Section 1016(a)(8). See page 35 of Brief for the Respondent in *Thompson* v. *Commissioner,* 322 F. 2d 122 (C.A. 5th, 1963), relevant excerpts of which were appended to the Government's brief in the District Court in the present case.

should not be a consideration for the redemption of Commodity Credit loans; an electing taxpayer must understand that once he elects under Section 77 to treat the loans as income, he realizes taxable income upon receipt of loan proceeds in the year of receipt, just as if he had sold the pledged crops. Moreover, this result is not as inconsistent with the Commodity Credit loan program as the Fifth Circuit suggested in *Thompson, supra.* A Commodity Credit loan is essentially a guarantee to the farmer that he will realize on the pledged crop *at least* the amount of the loan, for if the loan is not redeemed by the maturity date the Corpora-

tion's recourse is only to the pledged crop. 7 U.S.C. Section 1425. Thus, as a practical matter, the loan is more in the nature of a sale for a guaranteed minimum rather than a standard debt transaction in which the borrower simply pays interest for the use of principal over a given period of time.[9]

---

[9]The sale analogy, however, is not carried through to affect the character of interest payments made by the taxpayer who redeems a pledged crop. The present taxpayers paid interest when they redeemed their crops (R. 31A, 32A) and deducted those payments in their 1957 return (R. 28). That deduction was not challenged by the Commissioner. It is to be noted that interest is due upon redemption in whatever year redemption occurs, but that upon foreclosure no interest is paid. (R. 29-30.) Thus, the allowance of the interest deduction to the present taxpayers is no different from the treatment given taxpayers who redeem in a subsequent tax year, i.e., taxpayers as to whom the sale-repurchase analogy without question applies, as the court in *Thompson* conceded.

Generally speaking, the repurchase of property by a seller does not negate the original transaction so long as the original sale and the repurchase transactions were bona fide. *Weir* v. *Commissioner,* 109 F. 2d 996 (C.A. 3d, 1940), certiorari denied, 310 U.S. 637; *Patterson* v. *Motter,* 55 F. 2d 692 (Kan., 1931); *Abbot* v. *Welch,* 31 F. Supp. 369 (Mass., 1940). A repurchase of property in the same tax year as the original sale is not treated as a recission of the sale and does not mitigate the gain or loss realized on the sale. *Branum* v. *Campbell,* 211 F. 2d 147 (C.A. 5th, 1954); *Bancitaly Corp.* v. *Commissioner,* 34 B.T.A. 494 (1936); *Metropolitan Commercial Corp.* v. *Commissioner,* decided April 25, 1963 (22 T.C.M. 533). There is no basis in the statutory language or the legislative history of Sections 77 and 1016(a)(8) for concluding that these rules do not apply to Commodity Credit loans which Congress has determined should be taxed as sales upon the taxpayer's election to so treat them.

CONCLUSION

The judgment of the District Court should be reversed with directions to dismiss the complaint.

Respectfully submitted,

MITCHELL ROGOVIN,
Assistant Attorney General.
MEYER ROTHWACKS,
HARRY BAUM,
LOUIS M. KAUDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:
SMITHMOORE P. MYERS,
United States Attorney.
February, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1968.

_____
United States Attorney

Generally speaking, the repurchase of property by a seller does not negate the original transaction so long as the original sale and the repurchase transactions were bona fide. *Weir* v. *Commissioner,* 109 F. 2d 996 (C.A. 3d, 1940), certiorari denied, 310 U.S. 637; *Patterson* v. *Motter,* 55 F. 2d 692 (Kan., 1931); *Abbot* v. *Welch,* 31 F. Supp. 369 (Mass., 1940). A repurchase of property in the same tax year as the original sale is not treated as a recission of the sale and does not mitigate the gain or loss realized on the sale. *Branum* v. *Campbell,* 211 F. 2d 147 (C.A. 5th, 1954); *Bancitaly Corp.* v. *Commissioner,* 34 B.T.A. 494 (1936); *Metropolitan Commercial Corp.* v. *Commissioner,* decided April 25, 1963 (22 T.C.M. 533). There is no basis in the statutory language or the legislative history of Sections 77 and 1016(a)(8) for concluding that these rules do not apply to Commodity Credit loans which Congress has determined should be taxed as sales upon the taxpayer's election to so treat them.

CONCLUSION

The judgment of the District Court should be reversed with directions to dismiss the complaint.

Respectfully submitted,

MITCHELL ROGOVIN,
Assistant Attorney General.
MEYER ROTHWACKS,
HARRY BAUM,
LOUIS M. KAUDER,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

Of Counsel:
SMITHMOORE P. MYERS,
United States Attorney.
February, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1968.

_____
United States Attorney

(a) If a taxpayer elects or has elected under section 77, section 123 of the Internal Revenue Code of 1939, or section 223(d) of the Revenue Act of 1939 (53 Stat. 897), as amended, to include in his gross income the amount of a loan from the Commodity Credit Corporation for the taxable year in which it is received, then—

(1) No part of the amount realized by the Commodity Credit Corporation upon the sale or other disposition of the commodity pledged for such loan shall be recognized as income to the taxpayer, unless the taxpayer receives an amount in addition to that advanced to him as the loan, in which event such additional amount shall be included in the gross income of the taxpayer for the taxable year in which it is received, and

(2) No deductible loss to the taxpayer shall be recognized on account of any deficiency realized by the Commodity Credit Corporation on such loan if the taxpayer was relieved from liability for such deficiency.

* * *

(26 C.F.R., Sec. 1.77-2.)

§ 1.1016-5 *Miscellaneous adjustments to basis.*

* * *

(e) *Loans from Commodity Credit Corporation.* In the case of property pledged to the Commodity Credit Corporation, the basis of such property shall be increased by the amount received as a loan from such corporation and treated by the taxpayer as income for the year in which re-

ceived under section 77, or under section 123 of the Internal Revenue Code of 1939. The basis of such property shall be reduced to the extent of any deficiency on such loan with respect to which the taxpayer has been relieved from liability.

* * *

(26 C.F.R., Sec. 1.1016-5.)

APPENDIX B

84 Cong. Record, Part 7, pp. 7804-7805:

Mr. COOPER. * * *

* * *

The next amendment appearing at the bottom of page 44 has to do with commodity-credit loans. It provides in simple terms that where a farmer places his products, cotton or whatever the product may be, in what is commonly termed the Government loan, he receives a loan on that product. This provides that so far as the question of taxes is concerned the transaction may be treated the same as the sale of that product so far as the amount of money he receives is concerned. The point, of course, is that a farmer might get a loan this year and his product continue in the Commodity Credit Corporation. Next year he might get a loan and so on. The result might be that, considered as a loan, the income would all come at one time, so far as the tax is concerned, and he might be required to pay a tax on the whole amount whereas he had been receiving these loans all along. The effect of this amendment is simply to treat these loans made to the farmer so far as internal taxes are concerned the same as if it had been a sale.

Miss SUMNER of Illinois. Will the gentleman yield?

Mr. COOPER. I yield to the gentlewoman from Illinois.

Miss SUMNER of Illinois. We over here are wondering if that paragraph is complete enough

to permit him to deduct when he makes payment in the following year as a loss, if he has one?

Mr. COOPER. Oh, yes; it permits the deduction of a loss.

Mr. AUGUST H. ANDRESEN. Will the gentleman yield?

Mr. COOPER. I yield to the gentleman from Minnesota.

Mr. AUGUST H. ANDRESEN. In the case of corn, where a loan of 57 cents per bushel is made on the corn, and we will assume the market price is 40 cents, is it optional with the farmer to treat that loan either as a sale or as a loan?

Mr. COOPER. That is right.

Mr. AUGUST H. ANDRESEN. It is optional with him?

Mr. COOPER. It is optional with the farmer, so far as the income tax is concerned, whether he wants to treat it as a loan or sale.

Mr. AUGUST H. ANDRESEN. Assuming that he does treat it as a sale, but decides after he has made his return that he wants to treat it as a loan, and he loses 10 cents a bushel on the corn.

Mr. COOPER. He cannot do that. If he wants to exercise his own option and treat it as a sale and pay his income tax on the sale, then he cannot come back later and say, "I want to change it now and treat that as a loan and not as a sale." He has to do one or the other.

Mr. AUGUST H. ANDRESEN. Then title would in reality pass to the Government?

Mr. COOPER. This does not make any difference so far as title is concerned. This treats it as far as income-tax payment is concerned whatever way he wants to treat it.

Mr. AUGUST H. ANDRESEN. It seems to me this is going to be rather hard on the cotton farmers who have so much cotton in loan with the Government.

Mr. COOPER. As long as it is optional, I do not see how it could hurt anybody.

Mr. BUCK. Will the gentleman yield?

Mr. COOPER. I yield to the gentleman from California.

Mr. BUCK. Here is the advantage to the farmer, I may say to the gentleman from Minnesota: If he treats it as a sale in the year in which he gets a loan, he may then deduct and charge off against the amount the cost of production, which he never could charge off if he waited until the loans were liquidated in another year.

Mr. AUGUST H. ANDRESEN. That is true.

Mr. COOPER. That is one definite advantage. It gives him the opportunity of charging off his expenses and his cost at the time he asks that it be treated as a sale.

Mr. AUGUST H. ANDRESEN. At the present price levels, very few farmers have any income tax.

Mr. THOMASON. Will the gentleman yield?

Mr. COOPER. I yield to the gentleman from Texas.

Mr. THOMASON. Is there any change in the excise tax on copper?

Mr. COOPER. No; no change in that.

Mr. CRAWFORD. Will the gentleman yield?

Mr. COOPER. I yield to the gentleman from Michigan.

Mr. CRAWFORD. How does this amendment apply to those who have during the last 3 years, say, put cotton into loan and who have not yet reported that as income? They treated it as a loan at the time and it has not been reported as income.

Mr. COOPER. They can go back, if they want to, and treat that as income received at the time the loan was made.

Mr. CRAWFORD. Through amending their tax returns?

Mr. COOPER. That is right.

Mr. CRAWFORD. Insofar as the subsequent returns are concerned, as I understand the gentleman's explanation, this will operate almost exactly as making returns on the basis of an accrual or on the basis of cash income and outgo. In other words, having made the decision to report the income on the basis of accrual, they have to stick to that plan unless they get permission to change.

Mr. COOPER. That is correct.

Mr. CRAWFORD. And this will operate in a similar manner?

Mr. COOPER. That is correct, but there is no permit to change with respect to the years in which the taxpayer has already elected to treat such loans as sales.

Mr. CRAWFORD. I say, you will have to get the permit from the Commissioner?

Mr. COOPER. You cannot get a permit to change after you once exercise your option and elect.

Mr. CRAWFORD. In subsection (b) it is stated:

> Unless with the approval of the Commissioner a change to a different method is authorized.

Mr. COOPER. Yes; that is true. I beg the gentleman's pardon. But that only applies to future years.

Mr. CRAWFORD. That would be the same whether it is on an accrual or a cash basis?

Mr. COOPER. The gentleman is correct.

Mr. CRAWFORD. One other question. Having reported the loan money received, say, in 1939 as income, and then in 1940 at the time the loan is closed out it developing that there is an additional payment to be made to the farmer as a result of the sale of the products at a higher price

than the loan amounted to, the farmer will at that time include the additional amount as income?

Mr. COOPER. Yes; that is correct.

Mr. KERR. Mr. Speaker, will the gentleman yield?

Mr. COOPER. I yield to the gentleman from North Carolina.

Mr. KERR. This tax would have to be collected only at one time, whether it is considered as a sale or a loan?

Mr. COOPER. The gentleman is correct.

Mr. KERR. And if he continued to negotiate his loan after he had paid the tax one time, for the first loan, he would not have to pay it if he negotiated his loan in subsequent years on the same crops?

Mr. COOPER. Oh, no; of course not.

APPENDIX C

Table of Exhibits pursuant to Rule 18(2)(F) as amended:

Exhibits 1 and 2 were identified and admitted in evidence as set forth in the Pre-Trial Order and Agreed Facts. (R. 24-31.) The exhibits are identified at pages 26-27 of the Record and appear at pages 31A through 33 of the Record.